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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM, 1976

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

No. 76-528

CONSUMERS POWER COMPANY,
Petitioner,

v.

NELSON ABEGHLIMAN, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR 24 NAMED STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR 24 NAMED STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Statement of Interest of Amici Curiae

The States earnestly support the thorough and effective implementation of the National Environmental Policy Act ("NEPA"), particularly in the course of licensing the con-

struction and operation of nuclear power reactors. NEPA is the only Act of Congress which compels federal agencies to consider the broad range of impacts on health, safety and the environment which may be suffered by the States as a result of federal licensing of nuclear facilities. Though NEPA has been in effect for only eight years, Amici believe the benefits derived from the Act have far outweighed the costs which have been attributed to it so often by federally regulated industries.

The States, which traditionally have borne a responsibility to protect the health and safety of their citizens, have on numerous occasions invoked the protection of the substantive and procedural mandates of NEPA and, as a result, averted serious environmental degradation or the gross waste of fiscal and natural resources. Many of Amici have appeared as intervenors on behalf of their citizens before Atomic Safety and Licensing Boards of the Nuclear Regulatory Commission ("NRC") and have participated in rulemaking proceedings conducted by that agency. The reviews and information gathering conducted pursuant to NEPA have, in the view of Amici, only served to better protect our environment and to bring about more rational decisionmaking on the need for, proper design, and true costs of proposed nuclear facilities.

Arguments that NEPA is the principal culprit causing regulatory delays in the nuclear licensing process are somewhat suspect; at best such arguments, if sincere, are misdirected. Many organizations and individuals are upset with what they view as inordinate regulatory delay, but it is wrong to urge the judicial dismantling of NEPA to achieve their goals and thereby frustrate the Congressional intent in the Act.

As noted in petitioner Vermont Yankee's own brief (pp. 11-12), NRC staff examination of utility applications and safety assessments by the Advisory Committee on Re-

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actor Safeguards consume large amounts of time. The public hearings on construction permit applications, which would have to be held even if NEPA had never been enacted, take up relatively little time when compared to these safety reviews and actual construction periods.[1] In fact, industry's study of the problem has revealed that 49 percent of delay months are due to non-licensing causes.[2] Indeed, it has been conceded that while it takes staff only 10 months on the average to conduct the requisite environmental review for a facility, it takes approximately 19 months to complete safety reviews.[3] In the past, Commission personnel have argued for the need to modify certain reactor licensing procedures, but not the NEPA review process.[4] The amount of time attributable to NEPA review is *de mimimis.*

Amici submit that even if NEPA were in part responsible for the purported delay, such delay, when viewed in the context of the magnitude of the decisions to be made, is minor in nature. The type of facilities under discussion in these cases do on occasion take as many as 4 years and even longer to license (Petitioner's Brief ["Pet. Br."], No. 76-419, at 14); they also require, however, 6 years to construct. Of crucial importance though is the fact that each

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[1] NRC officials have testified before Congress that significant delays have not been caused by public involvement in licensing hearings. Hearings Before the Joint Committee on Atomic Energy on Nuclear Power Plant Siting and Licensing, 94th Cong., 1st Sess. (June 25, 1975) at 12-16, 78-79 (Lee Gossick, USNRC).

[2] The Causes of Nuclear Power Plant Delays: An Atomic Industrial Forum Survey 3 (April, 1974).

[3] Grainey, *Nuclear Reactor Regulation: Practice and Procedure Before the Nuclear Regulatory Commission,* 11 Gonzaga L.R. 809, 817 (1976).

[4] Shapar & Malsch, *Proposed Changes in a Nuclear Power Plant Licensing Process: The Choice of Putting a Finger In The Dike or Building a New Dike,* 15 William & Mary L.R. 539, 552-553 (1974).

facility will represent the capital investment of roughly one billion dollars,[5] will operate for approximately 40 years and will generate waste products which must be isolated from man and managed for as long as 250,000 years. To take four years to make a decision involving such an enormous commitment is completely justifiable.

The States do not believe NEPA or the decisions below threaten technological progress in this country or will undermine our Nation's efforts to simultaneously conserve and produce energy. The Act and the decisions only pose a threat to hasty or otherwise irrational decisions based on incomplete assessments of all the true costs of and alternatives to proposed licensing actions.

The continued integrity of NEPA is vital to the States and the Nation.

Statement of the Case

We subscribe to the statement of facts set forth in the brief for respondents Natural Resources Defense Council, Inc., *et al.* in No. 76-419, but wish to emphasize several points.

The operation of any nuclear power reactor entails a number of activities which have the potential for adversely affecting the public's health and safety and the environment. One aspect of operation is that reactors, as do many other industrial facilities, discharge waste products. Reactors do so in the form of spent fuel. Upon removal from the reactor core, spent fuel must be contained so as to shield persons and the environment from the highly

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[5] Costs approaching $1 Billion are projected for new 1100MWe facilities. General Accounting Office, *Cleaning Up the Remains of Nuclear Facilities—A Multibillion Dollar Problem*, June 16, 1977 (EMD-77-46) at 17. See also Ford Foundation, Report of the Nuclear Energy Policy Study Group, Nuclear Power Issues and Choices, Ballinger Pub. Co. (1977) (hereinafter "Nuclear Power Issues") at 115-118.

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penetrating radiation emitted by certain fission products. The fuel is typically stored in special pools of water which keep the temperature of the rods to safe levels and act as the necessary shield against radiation. It had been assumed by the then United States Atomic Energy Commission (AEC)[6] when it issued the rulemaking order reviewed by the Court of Appeals below,[7] that spent fuel would ultimately be subjected to a chemical extraction process, known as fuel reprocessing, to separate the unfissioned uranium and plutonium generated within the reactor core from other fission products, referred to as the "high level wastes." These wastes, which must be stored for many hundreds of years before levels of radioactivity fall off to safe levels, were to be surrendered to the AEC for long term management.[8] To date, no facilities or sites for the long term management of these wastes have been officially designated by either the AEC or its successor, the NRC.

Petitioner places great emphasis on the fact that most of the existing high level wastes in this country were produced as a result of the federal government's weapons program (Pet. Br., 10), but misleads the Court by failing to tell all of the facts regarding spent fuel and commercial high level liquid wastes.

> "While the volume of military wastes is large, the concentration of radioactive material in it is small compared with that in commercial waste *even if the latter is reprocessed.* This has frequently led to misleading comparisons between the amounts of military

---

[6] Now the United States Nuclear Regulatory Commission (NRC). The AEC was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.* and its regulatory functions were assumed by the NRC.

[7] Environmental Effects of the Uranium Fuel Cycle, 39 Fed. Reg. 14188 (April 22, 1974). App. 385-400.

[8] 10 CFR Part 50, App. F, subsec. 2 (1977).

> and commercial wastes. The amount of radioactivity in present commercial spent fuel waste is comparable to that in military waste and is increasing much more rapidly." Nuclear Power Issues, *supra* note 5, at 244, n.b. (Emphasis supplied).

In addition, the fiscal costs of waste management are significant. One commercial reprocessing facility operated in the United States for approximately 5½ years, closing in 1972. That plant, owned by Nuclear Fuel Services, Inc. (NFS), was located in West Valley, New York, outside of the city of Buffalo. It operated at extremely low capacity, but was nevertheless studded with controversy concerning excessive employee exposure to radiation and abnormal releases of radioactive effluents.[9] NFS generated 600,000 gallons of high level wastes which are still stored in "temporary" tanks on site. Last spring the company announced that it was abandoning the reprocessing field and would attempt to surrender the plant and all wastes to State government.

It has been projected in studies prepared for the NRC that the cost of decontaminating and decommissioning the Nuclear Fuel Services complex and disposing of the existing high level wastes may be in excess of $600,000,000. Monte Canfield, Director of the Energy and Minerals Division of the General Accounting Office, testified before Congress on waste disposal costs in part as follows:

> ". . . an ERDA contractor estimates that the cost of waste disposal at NFS would range from $58 million to $567 million. The contractor's study did not cover the

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[9] Hearings on Nuclear Waste Disposal Costs (West Valley, New York) Before the Subcommittee on the Environment, Energy and Natural Resources of the House Committee on Government Operations (March 8 and 10, 1977) (hereinafter "Hearings on Nuclear Waste Disposal Costs") at 5.

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> cost of decommissioning the plant. However, the contractor estimated that it would cost from $10.7 million to $65.7 million to decommission the Barnwell reprocessing plant, a plant which would be used to process spent commercial fuel." Hearings on Nuclear Waste Disposal Costs, *supra* note 9, at 12.[10]

Mr. Canfield went on to note that these figures could prove to be gross underestimates of actual costs. *Id.* Thus, while the volume of waste generated by commercial fuel reprocessing has been small to date when compared to the volume of waste from the federal nuclear weapons program, the fiscal costs are indeed substantial.

The Court of Appeals has recognized below[11] that NEPA requires the NRC to consider the costs and impacts of managing a nuclear reactor's wastes prior to an irreversible commitment of resources to the construction of the reactor and the generation of high level wastes. The wisdom of this decision is underscored by recent Congressional observations. In speaking of the problem of disposing of existing commercial high level liquid wastes, Subcommittee Chairman Leo J. Ryan stated,

> "Since the United States entered the so-called atomic age in the mid-1950's, the champions of nuclear power appear to have addressed their efforts primarily to the development of nuclear fuels and the production of power. But the management of the radioactive wastes generated seems to have been dismissed with an attitude of: 'We can solve that problem later; let's get on with the important work: namely getting the power plants on line.' But 'later,' as far as we

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[10] These estimates were set forth in "Alternative Process for Managing Existing Commercial High Level Radioactive Wastes" NUREG-0043 (April 1976).

[11] In the decision being reviewed in *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council, Inc.*, No. 76-419.

> are concerned in this subcommittee, is today." Remarks of the Subcommittee Chairman, Hearings on Nuclear Waste Disposal Costs, *supra* note 9, at 1.

Amici will demonstrate below that NEPA requires a consideration of the costs and impacts of fuel reprocessing and waste from any reactor prior to licensing by the federal government. To ignore these wastes and to license a facility without their inclusion in the cost-benefit analysis of the facility distorts that analysis and invalidates the final judgment as to whether licensing an individual facility is the appropriate choice among alternative federal actions.[12] Amici believe the impacts of a reactor's waste cannot be considered later, but must be considered prior to licensing. The fragmented approach to environmental review urged by petitioner is proscribed by NEPA.[13]

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[12] It is significant that the conservation alternative urged by respondents in *Consumers Power Company* v. *Nelson Aeschliman*, No. 76-528, is now a major component of the National Energy Plan:

> "The sixth principle, and *the cornerstone* of National Energy Policy, is that the growth of energy demand must be restrained through conservation and improved energy efficiency." *The National Energy Plan*, Executive Office of the President, Energy Policy and Planning, p. 28 (1977). (Emphasis supplied).

The States submit that energy conservation is an alternative to licensing which must be actively considered by responsible federal officials prior to final decisions on proposed energy related actions.

[13] As noted, the Table S-3 Rule was developed with a view to the eventual reprocessing of nuclear fuel, however, National policy has developed in another direction. On April 7, 1977 President Carter announced that the United States would "defer indefinitely the commercial reprocessing and recycling of the plutonium produced in the U.S. nuclear power programs." 13 Weekly Comp. of Pres. Doc. 503 (April 11, 1977) and 581 (April 25, 1977). This policy was foreshadowed on October 28, 1976 by the publicly-announced conclusion of President Ford that reprocessing

(footnote continued on following page)

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The Court of Appeals decision on the Table S-3 Rule is well founded. Contrary to the characterizations of the federal respondents and petitioner, the Court did not reject the Table S-3 Rule devised by the Commission on the basis of the rulemaking procedures utilized, but rather because of the glaring inadequacy of the record. Though the day and one-half hearing on the impacts of the entire nuclear fuel cycle would have been suspect to any objective onlooker, it was not the brevity of the proceedings which compelled the Court below to reverse the AEC. It was the AEC's complete acceptance of the unreferenced, naked assertions by its own staff witness in charge of the agency's nuclear waste program which rendered the rule fatally defective.

(footnote continued from preceding page)

could no longer be regarded as a necessary step in the nuclear fuel cycle. 12 Weekly Comp. of Pres. Doc. 1625 (November 1, 1976). On May 3, 1977 the NRC announced that it would reassess its position on fuel reprocessing in response to the Administration's policy. 42 Fed. Reg. 22964 (May 5, 1977). The period for public comment on the NRC announcement closed on June 3, 1977 and a Commission decision in forthcoming. Hence, whether or not the substance of the Table S-3 Rule will be germane to future reactor licensing is problematical. Indeed, the question placed before the court as to whether the overall totals in Table S-3 are supported by the administrative record on the issues of fuel reprocessing and high level waste management may be rendered unworthy of review by the pending NRC policy reassessment.

ARGUMENT

I.

The Court of Appeals' holding that the Commission failed to explain adequately on the record its decision that the environmental effects of nuclear waste disposal are "relatively insignificant" is required by both the Administrative Procedure Act and the National Environmental Policy Act.

In its brief, petitioner Vermont Yankee seeks to characterize the holding of the Court of Appeals as based on the premise that the Commission employed inadequate procedures in reaching its conclusion that environmental effects of the nuclear fuel cycle, including waste disposal, are "relatively insignificant" (Pet. Br., 30-31). The federal respondents, in their brief, regard it as "open to dispute" as to whether the Court of Appeals' decision should be read as petitioners read it, or should be read as holding that the Commission's decision was not based on an adequate record (Federal Respondents' Brief ["Federal Br."] at 36-38). The federal respondents concede that if the Court of Appeals' ruling is read in the latter fashion, "no significant question for review by this Court would be presented." *Id.*

The States can only view with skepticism the uncertainty of the federal respondents as to whether the Court of Appeals' decision was based on the inadequacy of the Table S-3 record or rulemaking procedures. In subsequent notices regarding the new hearings on the rule in which the Commission has refused to increase significantly the scope of procedures and public participation in the hearings, the Commission has consistently taken the position that the Court of Appeals did not find the Commission's prior procedures to be inadequate, but rather merely determined the record to be incomplete (41 Fed. Reg. 45849, 45850 [Oc-

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tober 18, 1976]):

> "[T]he court found that the rule was inadequately supported by the record insofar as it treated two particular aspects of the fuel cycle—the impacts from reprocessing of spent fuel and the impacts from radioactive waste management."

In a more recent notice the Commission stated that:

> "The original procedures proved adequate for development and illumination of a wide range of fuel cycle impact issues . . . . True, the record was held inadequate on the two matters at issue here, but these issues are of the same character as the other issues regarding which the record did prove adequate. . . .
>
> ". . . The court here indicated that the procedures previously employed could suffice, and indeed did for other issues . . . .
>
> • • •
>
> "Accordingly, notice is hereby given that the rules for the conduct of the reopened hearing and the authorities and responsibilities of the Hearing Board will be the same as originally applied in this matter (38 FR 49, January 3, 1973) except that specific provision is hereby made for the Hearing Board to entertain suggestions from participants as to questions which the Board should ask of witnesses for other participants." 42 Fed. Reg. 26987, at 26988-89 (May 26, 1977).[14]

Nevertheless the federal respondents have gone on to urge that if the Court is to be taken as having required additional procedures, it exceeded the authority given it by Congress to review informal rulemaking proceedings (*Id.*, at 46-51). Petitioner Vermont Yankee takes the identical position (Pet. Br., 35-38).

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[14] Reprinted in Supplemental Appendix to the Petition for Certiorari in No. 76-419 at SA-20 to SA-24.

Amici curiae have no quarrel in general terms with this view of the scope of judicial review of informal rulemaking. Indeed, *amici* agree that, except where strong justification is shown, a court ought not to be able to require additional procedures in such proceedings, since the result of the existence of such a power would be to cause agencies to adopt more and more elaborate procedures and thus defeat the purpose of informal rulemaking. But *amici* do not feel that the Court of Appeals violated this rule in this case; the Court did not invalidate the Commission's rule because of some failure to employ certain particular procedures. The rule was invalidated because the Commission completely failed to explain the reasoning it employed in reaching its conclusion, and thus presented the Court of Appeals with an inadequate record.

A. The Administrative Procedure Act Requires That Agencies Engage in Reasoned Decisionmaking in Informal Rulemaking.

Under § 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), a Court is empowered to "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion . . ."[15] This Court has interpreted this standard to mean that, in reviewing agency action, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment," which may "require some explanation in order to determine if the . . . [agency's] action was justifiable." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 420. "The agency must articu-

[15] This standard applies regardless of whether the agency is engaged in its adjudicatory capacity, or in its formal or informal rulemaking capacity, "agency action" being defined by the APA to include any agency "rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

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late a 'rational connection between the facts found and the choice made.'" *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281, 285, citing *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168. See also *Camp* v. *Pitts,* 411 U.S. 138, 142.

While none of these statements were made in the context of review of informal rulemaking, the principles expounded therein have been applied by numerous Courts of Appeals in reviewing such administrative action. "Courts require that administrative agencies 'articulate the criteria' employed in reaching their result and are no longer content with bare administrative *ipse dixits* based on supposed administrative expertise." *Appalachian Power Co.* v. *Train,* 545 F. 2d 1351 (4th Cir. 1976), quoting from *Appalachian Power Co.* v. *Environmental Protection Agency,* 477 F. 2d 495, 507 (4th Cir. 1973). "The grounds upon which an agency bases its decision must be clearly disclosed in, and sustained by, the record. The agency must make plain its course of inquiry, its analysis and its reasoning." *American Petroleum Institute* v. *Environmental Protection Agency,* 540 F. 2d 1023, 1029 (10th Cir. 1976). In the absence of a detailed record, it is "advisable for the agency, in lieu thereof, to provide a thorough and comprehensible statement of the reasons for its decision." *National Nutritional Foods Ass'n* v. *Weinberger,* 512 F. 2d 688, 701 (2d Cir. 1975). See generally, *Ethyl Corporation* v. *Environmental Protection Agency,* 541 F. 2d 1, 33-37 (D.C. Cir. 1976); *American Meat Institute* v. *Environmental Protection Agency,* 526 F. 2d 442, 453 (7th Cir. 1975). General principles of administrative law have long imposed an affirmative duty upon administrative agencies to compile a complete record. See *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F. 2d 608, 620-621 (2d Cir. 1965), cert. den. 384 U.S. 941, and the cases cited therein.

B. The National Environmental Policy Act Requires That, in Undertaking Informal Rulemaking, Agencies Engage in Reasoned Consideration of Environmental Consequences.

Section 102(2)(c) of the National Environmental Policy Act requires that before undertaking any "major Federal action," an agency of the federal government shall prepare a statement describing in detail the environmental consequences of the action. 42 U.S.C. § 4332(2)(C). In *Kleppe* v. *Sierra Club*, 427 U.S. 390, this Court observed that in reviewing the adequacy of such statements the "role for a court is to insure that the agency has taken a 'hard look' at the environmental consequences." *Id.* at 410, n. 21, citing *Natural Resources Defense Council* v. *Morton*, 458 F. 2d 827, 838 (D.C. Cir. 1972) (LEVENTHAL, J.); *New York* v. *Kleppe*, 429 U.S. 1307, 1310-11 (circuit opinion of MARSHALL, J.). In other words, the court's obligation is to "scrutinize the analysis of environmental consideration, [to assure] that a reasoned decision has been reached." *Portland Cement Association* v. *Ruckelshaus*, 486 F. 2d 375, 386 (D.C. Cir. 1973) (LEVENTHAL, J.).

In order to facilitate such review, the obligation of the agency in preparing its statement is to "explicate fully its course of inquiry, its analysis and its reasoning." *Ely* v. *Velde*, 451 F. 2d 1130, 1139 (4th Cir. 1971). The statement cannot be "too vague, too general and too conclusory," *Environmental Defense Fund* v. *Froehlke*, 473 F. 2d 346, 348 (8th Cir. 1972), and cannot be "unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind." *Natural Resources Defense Council* v. *Grant*, 355 F. Supp. 280, 287 (E.D.N.C. 1973). Moreover, scientific conclusions appearing in an impact statement without reference to the relevant literature or the field studies from which the conclusions were drawn do not constitute an adequate "detailed statement." *Environmental Defense Fund* v. *Tennessee Valley Authority*, 339 F. Supp. 806, 809 (E.D. Tenn., 1972). When com-

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ments from outside the agency "disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." *Silva* v. *Lynn*, 482 F. 2d 1282, 1285 (1st Cir. 1973). See also *City of Rochester* v. *United States Postal Service*, 541 F. 2d 967, 973 (2d Cir. 1976); *Appalachian Power Co.* v. *Environmental Protection Agency, supra*, 477 F. 2d 507; *Sierra Club* v. *Morton*, 510 F. 2d 813, 820 (5th Cir. 1975); *Minnesota Public Interest Research Group* v. *Butz*, 541 F. 2d 1292, 1299-1300 (8th Cir. 1976).

It is true that in the present case, the Commission's rule-making proceeding itself is not a "major Federal action" within the meaning of Section 102(2)(C) of NEPA (App. 66, n. 58). However, there are two independent reasons which justify the Court of Appeals' application of the "hard look" test of *Kleppe* v. *Sierra Club, supra*, 427 U.S. 410, n. 21, in its review of the Commission's rule-making.

First, the mandate of NEPA—that Federal agencies give "substantial and consistent consideration to environmental factors in their decisionmaking"—is not limited to "major Federal actions"; only the procedural requirement to prepare an EIS is. *Rhode Island Committee on Energy* v. *General Services Administration*, 397 F. Supp. 41, 58 (D.R.I., 1975); *cf. Environmental Defense Fund* v. *Corp. of Engineers*, 470 F. 8d 289, 298 (8th Cir. 1972), cert. den., 412 U.S. 931. Section 102(1) of NEPA, 42 U.S.C. § 4332(1), is a specific directive to the agency that it give full, good faith consideration to the relevant environmental issues implicated in any of its actions, including rule-making. *Calvert Cliffs Coordinating Committee* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1112-13, n. 5 (D.C. Cir. 1971).

Secondly, and more importantly, the obligation of the reviewing court under NEPA to insure that the agency in

this case has taken a "good, hard look" at the problem of waste disposal prior to issuing a permit can only be fulfilled in its review of the Commission's rulemaking proceeding. By providing that "[n]o further discussion of the environmental effects [of nuclear waste produced by the applicant's facility] shall be required [in an EIS]" other than the reprinting of Table S-3 (App. 398), the rule in effect declares that the Commission has, as a matter of law, satisfied the requirement of 42 U.S.C. § 4332(2)(C) for every subsequent proceeding involving the issuance of a permit for a nuclear power facility. Restated in its simplest terms, the rule says that the Commission has already taken the "good, hard look" at the problem of nuclear waste control as required by NEPA. Because the rule forecloses any further inquiry as to the sufficiency of Table S-3 for NEPA purposes in all subsequent licensing proceedings, the only opportunity for determining whether the Commission has accomplished what its rule says it has accomplished—the NEPA-mandated "good, hard look" at nuclear waste control—is in the Court of Appeals' review of the rule itself.

C. The Court of Appeals Held that the Commission's Action was Unlawful Because the Commission Failed to Provide a Reasoned Explanation on the Record of its Conclusion.

Analysis of the Court of Appeals' opinion shows that its basis for overturning the Commission's action was not that the Commission failed to employ certain procedures, but that it failed to explain its reasoning on the record as required by both the APA and NEPA. At the outset, the Court stated the question as follows:

> "The problems posed in both these cases relate to the manner and extent to which information concerning the environmental effects of radioactive wastes must be considered *on the public record* in decisions to license nuclear reactors." (App. 30) (Emphasis supplied).

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After reviewing the history of the proceedings before the Commission, and stating the contentions of the parties as to their adequacy, the Court carefully outlined the narrow scope of review under which it was operating. Citing the mandate of this Court in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, that it is "not proper" for a court to prescribe specific procedures for an agency in informal rulemaking the Court stated its duty to be only to

> ". . . scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way were provided, and that the agency has taken a good, hard look at the major questions before it." (App. 46)

The Court finally concluded that in determining whether such a "hard look" has been taken, it is far less concerned with the devices by which the agency proceeded than with the rigor with which it explained its results.

> ". . . [W]hat is required is a reasoned response, in which the agency points to particulars in the record which, when coupled with its reservoir of expertise, support its resolution of the controversy. An agency may abuse its discretion by proceeding to a decision *which the record before it will not sustain,* in the sense that it raises fundamental questions for which the agency has adduced no *reasoned answers.*" (App. 50) (Emphasis supplied).

With these principles in mind, the Court then undertook an exhaustive examination of the record before it in this case, probing for any discussion of the reasoning or judgments on which the Commission based its decision on the problem of nuclear waste disposal (App. 50-65). It found the record completely devoid of such explanations. It noted that the Enviromnental Survey prepared by the Commission staff and later incorporated into its

rule failed to provide a "detailed explanation" of its conclusion that the problem was insignificant, relying entirely on the mere statement of a Commission officer that a "permanent repository" will be established and maintained by the federal government (App. 53). The Court observed that this statement represented a radical shift in Commission policy away from an earlier plan to store the wastes in abandoned salt mines, but found that the reasons for such a shift were "not discussed" (App. 54). As for the repository plan itself, the Court found the description of it in the survey utterly "conclusory." It found no discussion as to its method of construction and operation, or of its cost or location; no explanation as to why a "meltdown" would not occur, or what would be done if it did; no plan for protecting the facility from terrorists (App. 53-63). The Court then observed:

> "We do not dispute [the Commission's] conclusions. We may not uphold them, however, lacking a thorough explanation and a meaningful opportunity to challenge the judgments underlying them. Our duty is to insure that the reasoning on which such judgments depend, and the data supporting them, are spread out in detail on the public record." (App. 61).

It then concluded:

> "In substantial part, the materials uncritically relied on by the Commission in promulgating this rule consist of extremely vague assurances by agency personnel that problems as yet unsolved will be solved. That is an insufficient record to sustain [the rule]. . . . Without a thorough exploration of the problems involved in waste disposal, . . . this type of agency action cannot pass muster as reasoned decision-making." (App. 65-66).

The Commission's action, therefore, violated the requirements of Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), that the Commission

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"articulate its reasoning and . . . specify the evidence on which it relies," as well as the requirement of Section 706(2)(A) of the Administrative Procedure Act that an agency action not be "capricious and arbitrary." (App. 69, 71).

In the face of all this, petitioner Vermont Yankee and federal respondents incredibly suggest that the holding of the Court of Appeals has something to do with requiring that the Commission adopt additional procedures before it may validly promulgate the rule at issue. In fact, of course, the opposite is true. The Court was quite explicit that it was not particularly concerned about *how* the Commission went about "fleshing out" the record. Even the procedures actually adopted "if administered in a more sensitive, deliberate manner, might suffice" (App. 67). Significantly, petitioner and federal respondents provide no relevant citation to the Court's actual words; their briefs are more interested in talking about how the Court has no power to require specific procedures in informal rulemaking proceedings.[16] *Amici* do not dispute this point; in fact, as indicated above, they agree with it. The point is that the Court of Appeals imposed no additional requirements, invaded no discretion, but merely returned to an agency a decision so utterly conclusory as to be incapable of review.

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[16] At page 48 the federal respondents' brief states that Court "set aside the agency rule because it found the procedural format insufficient." There is no citation to court's opinion; nor could there be, since the court did not hold this at all.

II.

NEPA requires that the licensing of nuclear power generating plants proceed only upon a record which contains thorough consideration of the environmental impacts of nuclear waste disposal.

The pertinent provisions of the National Environmental Policy Act direct all agencies of the federal government, in connection with all "major Federal actions significantly affecting the quality of the human environment," to prepare a "detailed statement" on

> "(i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.
>
> • • •
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." (42 U.S.C. § 4332 [2][C]).

It is undisputed that the licensing of a nuclear power plant is a "major Federal action" within the meaning of NEPA (App. 33-34). It is also undisputed that the licensing and consequent operation of nuclear power generating plants, as an absolute certainty, and without the intervention of any other event, produces long-lived and highly toxic radioactive wastes. *Id.*

From the outset of the proceedings before the Atomic Safety and Licensing Board to license the operation of the Vermont Yankee nuclear plant, the intervenors, Natural Resources Defense Council, Inc., et al., attempted to have that Board consider, within its NEPA mandate, the en-

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vironmental impact of reprocessing and nuclear waste disposal. Their attempts were unavailing, as both the Licensing and Appeal Boards ruled that evidence on the environmental impact of radioactive waste disposal could not be admitted in the proceedings to license Vermont Yankee (App. 112, 113, 129). The ruling of the Appeals Board was based fundamentally on its perception that the Commission's responsibilities under NEPA with respect to waste disposal issues could be fulfilled at some future point when proposals to license reprocessing and waste facilities came before it to be licensed (App. 123-124). Further, the Appeals Board stated in June of 1972:

> "Evaluation of the environmental aspects of the ultimate depository of the high level wastes resulting from reprocessing is at this time speculative, because it has not yet been determined what the nature or the location of the ultimate depository may be. That project will also of course be subject to independent analysis and procedures in compliance with the Environmental Protection Act, (sic) and it cannot be the subject of appropriate evaluation in this proceeding." (App. 126-127).

Six months after the Appeal Board's ruling that the environmental impacts of radioactive waste disposal were too remote and speculative in the context of reactor licensing proceedings to be susceptible of meaningful analysis under NEPA, the Commission announced the commencement of a rulemaking proceeding to do precisely that which it had maintained in the *Vermont Yankee* proceedings was impossible (App. 352-360). It also announced that the Staff of the Commission had already prepared an "Environmental Survey of the Nuclear Fuel Cycle" which included Table S-3, designed to quantify the annual contribution of each reactor to the total fuel-cycle environmental costs, including reprocessing and waste disposal impacts (App. 356-360).

These rulemaking proceedings will be discussed at somewhat greater length below. It is sufficient to note at this point that the rulemaking, which was conducted without adjudicatory procedures, dealt in pertinent part with precisely the same issues that the intervenors had attempted to raise in *Vermont Yankee* and culminated in the promulgation of a regulation adopting a slightly modified version of Table S-3, providing that it should be inserted in each environmental impact statement prepared pursuant to NEPA for individual reactor licensing proceedings, and further providing that, in each licensing case "[n]o further discussion of such environmental effects shall be required" (App. 398). The Commission ruled: "Insofar as this rule differs from the Appeal Board decisions in 'Vermont Yankee' supra, those decisions have no further precedential significance." (App. 386).

What the Commission had done then, was to rule first that reprocessing and waste disposal impacts were too speculative to be considered in reactor licensing proceedings and then to reverse itself by promulgating a rule which purported not only to fully consider these impacts, but to resolve them beyond the possibility of argument for *all* licensing proceedings for the indefinite future. The door was closed shut after the promulgation of Table S-3 (App. 398; *see also*, Federal Br., 16, n. 13).

Both Vermont Yankee and the federal respondents profess confusion about the meaning of the decision of the Court of Appeals. The *amici* suggest that the holding is quite clear. The Court held that the generation of nuclear waste is an "adverse environmental effect which cannot be avoided" if a nuclear power plant is licensed, within the meaning of NEPA, 42 U.S.C. § 4332(2)(C)(ii), (App. 33). The generation of such wastes and the facilities and resources necessarily required to protect and contain them constitute an "irreversible and irretrievable commitment of resources" which necessarily will follow upon the licensing

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of a nuclear power plant, within the meaning of 42 U.S.C. § 4332(2)(C)(v), (App. 33). The Court found that NEPA requires such impacts to be considered in the licensing of power reactors, and agreed with the Commission that the requisite analysis could be performed in the context of a rulemaking proceeding (App. 39, 67-68). Finally, the Court held that the cursory record on waste disposal issues compiled by the Commission in the rulemaking proceeding for Table S-3 was insufficient to show whether reasoned decisionmaking had in fact taken place, and "frustrate(d) oversight by anyone." (App. 61-62). The Court directed the agency, in the rulemaking forum, to "identify and address information contrary to its own position, to articulate its reasoning and to specify the evidence on which its relies." (App. 69).

Whatever the merits of the rule itself, or of the record compiled before the agency, it is clear that, in promulgating Table S-3, the Nuclear Regulatory Commission recognized that the environmental impact of reprocessing and waste disposal were relevant issues under NEPA to be included in the Environmental Impact Statement for each reactor and considered by the Atomic Safety and Licensing Board in each licensing proceeding. Indeed, the federal respondents do not contest this point, but rest their entire argument on the sufficiency of the procedures used in promulgating Table S-3.

The petitioner Vermont Yankee takes a different view. It stands by the Appeal Board's ruling in the *Vermont Yankee* licensing proceeding to the effect that the "proposal" before the Commission in any individual licensing case is simply to authorize construction or operation of a power reactor and that the environmental impact of the wastes generated by the reactor can be fully considered when reprocessing and waste disposal facilities are licensed (Pet. Br., 40-41). The position is curious given that the Commission expressly rejected this reasoning when it promulgated Table S-3 and invalidated the "precedential

significance" of the Appeal Board's ruling in *Vermont Yankee* (App. 386).

The petitioner relies heavily on *Kleppe* v. *Sierra Club, supra,* 427 U.S. 390, as support for the proposition that the Commission should completely exclude consideration of the environmental impacts of waste disposal from proceedings to license nuclear reactors. This reliance is misplaced. The ruling in *Kleppe* was that, as a factual matter, the federal government was not engaged in or proposing a Northern Great Plains regional coal development program, and that such a region-wide intent could not be inferred from the government's decision to undertake coal development activities in several discreet locales. *Id.* at 400. Therefore, there was no "proposal" for the region and no requirement for a regional Environmental Impact Statement under NEPA. It is worth noting that the Court reaffirmed the proposition in *Kleppe* that NEPA is action-forcing, in that it requires "all agencies to assure consideration of the environmental impact of their actions in decisionmaking." *Id.* at 409.

The situation presented by the cases at bar is entirely different and there is nothing in *Kleppe* inconsistent with the decision below. No party contends that the "proposal" is anything other than a proposal to license a nuclear power generating plant. Amici argue simply that irrefutably inherent in this proposal is the creation of radioactive waste; it is an "adverse environmental effect which cannot be avoided." 42 U.S.C. § 4332(C)(ii). The Court of Appeals was clearly correct in ruling:

> "The plain meaning of this language encompasses radioactive wastes generated by the operations of a nuclear power station, just as it does the stack gases produced by a coal-burning power plant." (App. 33).

If the position of the petitioner were adopted, it would mean that those given the authority and the public trust

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to license nuclear power plants could do so while indefinitely deferring the consideration of the most diuturnal environmental impact of their actions in decisionmaking—the creation of long-lived toxic wastes. Meanwhile, those wastes would be created and stored at nuclear plant sites never originally intended as long or medium-term waste repositories. By the time the ramifications of radioactive waste came to be considered, our options as a society would be substantially curtailed. *Scientists' Institute for Public Information, Inc.* v. *A.E.C.*, 481 F. 2d 1079, 1090 (1973).[17] We can imagine no clearer case for application of the principle that, pursuant to NEPA, the federal agency must consider the natural consequences of its decisions before it makes them. *Calvert Cliffs Coordinating Committee* v. *A.E.C.*, *supra* 449 F. 2d 1112; *Kleppe* v. *Sierra Club*, *supra* 427 U.S. 409.

Petitioners maintain that to construe NEPA so as to require consideration of radioactive waste disposal impacts would involve what amounts to an unwarranted amendment to the Atomic Energy Act. The argument, stripped of its hyperbole, is that Congress has authorized the operation of commercial nuclear reactors through passage of the Atomic Energy Act and could not have intended any application of NEPA which might complicate or alter the licensing process. In short, petitioners are here attempting to reopen issues resolved by the *Calvert Cliffs* case. In answer to the argument, propounded at that time by the Atomic Energy Commission, that its statutory mission to license power plants conflicted with the requirements of NEPA, the Court held:

> "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and

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[17] *See also, Calvert Cliffs Coordinating Committee* v. *A.E.C.*, *supra* 499 F. 2d 1128: "If 'irreversible and irretrievable commitments of resources' have already been made, the licensing hearing (and any public intervention therein) may become a hollow exercise."

> department . . . Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates.
>
> • • •
>
> "But the very purpose of NEPA is to tell federal agencies that environmental protection is as much a part of their responsibility as is protection and promotion of the industries they regulate." 449 F. 2d 1112.

In any case, it is not at all clear that Congress is as sanguine about the nuclear power industry, and the Commission's regulation of it, as the petitioner suggests. The Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.*, effected an extremely significant change in the historical pattern of regulation and promotion of the nuclear industry in this country, separating the Atomic Energy Commission into two agencies and vesting the Nuclear Regulatory Commission with regulatory and licensing functions only. 42 U.S.C. §§ 5841-5849. In substantial part, this legislative action was in response to the Congressional perception that promotional and regulatory goals could not appropriately continue to be exercised jointly by the Atomic Energy Commission in a field so sensitive as nuclear power.[18]

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[18] "The reorganization established by this legislation has the additional purpose of separating the regulatory functions of the A.E.C. from its developmental and promotional functions—a response to growing criticism that there is a basic conflict between the AEC's regulation of the nuclear power industry and its development and promotion of new technology for the industry." S. Rep. N. 93.980, U.S. Code & Cong. News, 5470, 5471 (1974). See also *Note: The Energy Reorganization Act of 1974: More Power To The People?* 7 Loy. Chi. L.J. 410 (1976); Davis, *Citizen's Guide To Intervention In Nuclear Power Plant Siting: A Blueprint for Alice In Nuclear Wonderland,* 6 Env. Law 619, 628, n. 36 (1976).

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The petitioner's final argument, a derivative of the preceding one, is that full consideration of the environmental impact of radioactive wastes will bring the nuclear power program to a halt. It bears mentioning that this case has not even brought the Vermont Yankee plant to a halt. It is still operating and generating electricity. Two points should be made in response to these dire predictions. First, the Court below specifically approved the use of generic rulemaking proceedings to treat these issues so long as the record generated would truly justify the conclusions made by the agency (App. 68-69). What the Court held is that, absent fair and thorough generic proceedings, the issues cannot be ignored in individual licensing cases (App. 39).

Second, NEPA does not dictate a particular substantive result on these or any other issues. Rather, it mandates a "hard look" at environmental costs, based on the premise that decisionmakers will best exercise their authority when they are fully cognizant of the whole range of consequences of their acts. *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. 410, n. 21. If the benefits of proceeding with nuclear plants outweigh the costs, including the costs inherent in the creation of radioactive wastes, then nuclear plants will be licensed. If they do not, or if special measures need to be taken to mitigate environmental damage in the future, it is far better that we discover that now rather than after the problem has thrown the Nation into another energy-related "crisis."

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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